Wrongful convictions in the criminal justice system

Background Paper

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WRONGFUL CONVICTIONS IN THE CRIMINAL JUSTICE SYSTEM

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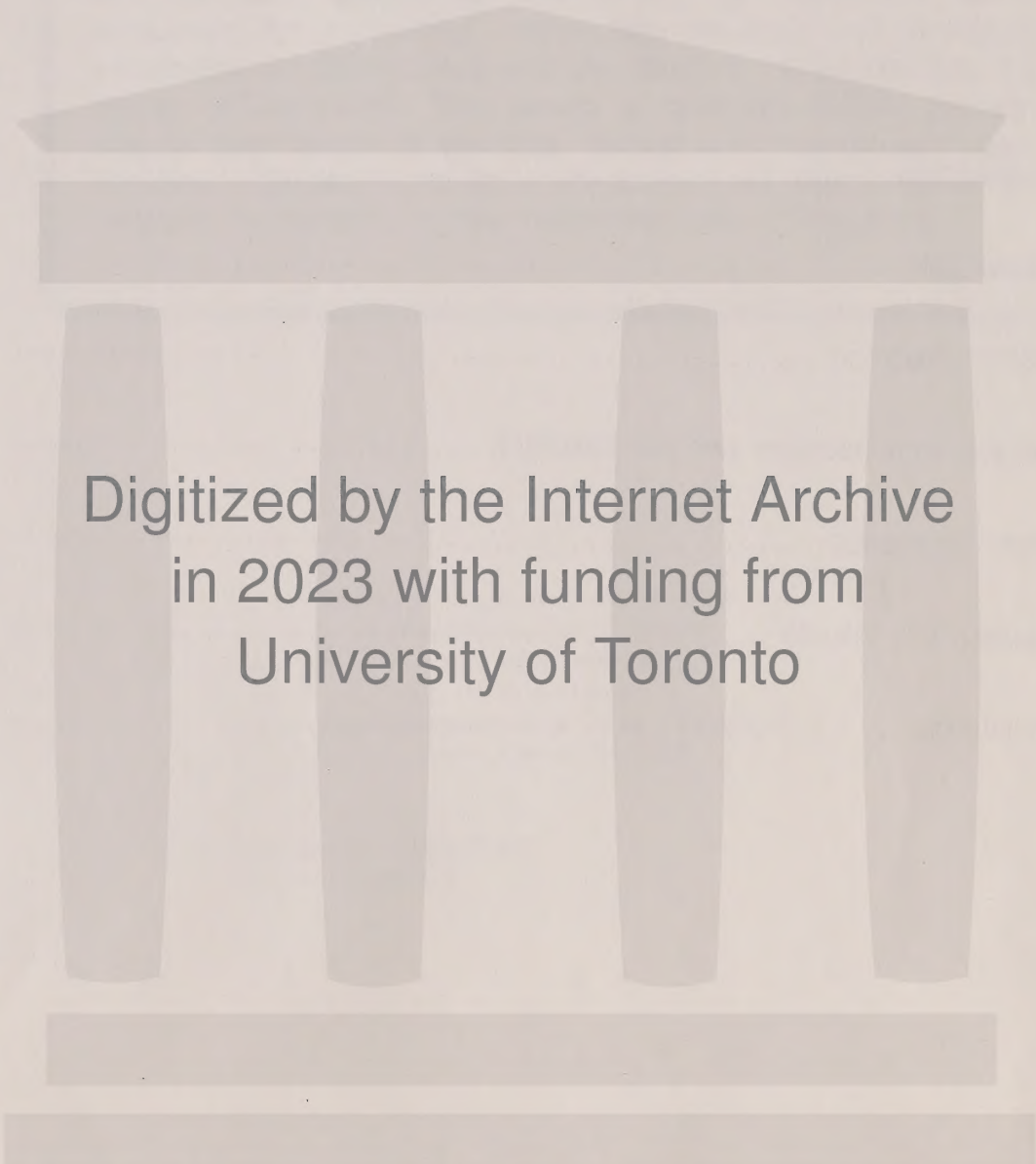

WRONGFUL CONVICTIONS IN THE CRIMINAL JUSTICE SYSTEM

INTRODUCTION

The legitimacy of the criminal justice system is based largely upon both its effectiveness and its fairness. Its effectiveness is judged by its ability to investigate and detect crime, identify offenders and mete out the appropriate sanctions to those who have been convicted of offences. Its fairness is judged by its thoroughness and the efforts it makes to redress the resource imbalance between the accused and the state at the investigatory, pre-trial, trial and appellate stages. The system does this by providing evidentiary protection and effective legal representation at all points.

Wrongful convictions undermine the two prongs of the criminal justice system's legitimacy. If someone is wrongfully convicted, that person is punished for an offence he or she did not commit and the actual perpetrator of the crime goes free. As well, public confidence in the system declines when wrongful convictions are identified.

The criminal justice system is based on the fundamental legal value that an accused is legally presumed to be innocent, until adjudication after a trial. This is in contradiction with the public expectation that most of those charged with criminal offences are, and will be found to be, guilty. Wrongful convictions undermine both this fundamental legal value and this public expectation since they show that the presumption of innocence may be honoured in its breach and that the criminal justice system does not only deal with the guilty.

Public attention has in recent years been brought to the issue of wrongful convictions by the Donald Marshall case in Canada(1) and the Rubin "Hurricane" Carter case in the United States.(2) There are probably fewer truly wrongful convictions than claimed, but there may still be a surprising number. It has been claimed that in Great Britain, the wrongful conviction rate may be as high as .1% - or one out of every thousand people. Another estimate is that there may be 15 cases of wrongful convictions each year in Great Britain. Academic studies in the United States indicate that between one-half and 1% of persons convicted of serious offences did not commit the crime. It has also been suggested by the Criminal Justice Research Centre that as many as 6,000 persons a year are wrongfully convicted of felonies in the United States. There are no similar estimates of the number of wrongful convictions in Canada. An official with the Department of Justice recently estimated that the Department receives about 30 applications a year for the review of criminal convictions.(3)

The causes of wrongful convictions are easy to identify: irregularities and incompetence at the investigatory, pre-trial, trial and appellate stages of the criminal justice system. More particularly, Kaiser identifies the following contributory factors, among others: false accusations, misleading police investigative work, inept defence counsel, misperceptions by Crown prosecutors of their role, factual assumption of an accused's guilt by actors in the criminal justice system, community pressure for a conviction, inadequate identification evidence, perjury, false confessions, inadequate or misinterpreted forensic evidence, judicial bias, poor presentation of an appellate case, and difficulty in having

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(1) Royal Commission on the Donald Marshall Jr. Prosecution, *Report*, Province of Nova Scotia, December 1989.

(2) Sam Chaiton and Terry Swinton, *Lazarus and the Hurricane: The Untold Story of the Freeing of Rubin "Hurricane" Carter*, Viking, Toronto, 1991.

(3) Jim Middlemiss, "Guilty Until Proven Innocent," *Canadian Lawyer*, November 1991, p. 20-25.

fresh evidence admitted at the appellate stage.(4) Each instance of determined wrongful conviction illustrates a different combination of failures in the criminal justice system that have prevented it from functioning effectively and fairly.

Because findings of wrongful conviction represent a basic undermining of the integrity of the criminal justice system, the procedures established for the review of such cases are extraordinary in nature and are rarely invoked successfully. For it to be otherwise would be to put in question the criminal justice system's legitimacy and, by bringing attention to its fallibility, to weaken public confidence in it.

This paper has a relatively modest purpose - it will examine only one of the extraordinary recourses available in this country for the review of criminal convictions: applications under s. 690 *Criminal Code* (Cr.C.)(5) to the Minister of Justice for mercy. This recourse is being examined because in recent years it has been the object of considerable controversy in relation to a number of particular cases of alleged wrongful conviction. The paper will outline the law and practice as they now are and identify some of the problems. Recent reform proposals will be described and a proposal for change will be set out.

PRESENT LAW

Perhaps the oldest form of relief from a punishment is the exercise of a pardoning power by a sovereign authority.(6) There are

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(4) H. Archibald Kaiser, "When Justice is a Mirage: A Primer on Wrongful Conviction," Paper presented at the Conference on Wrongful Conviction, Human Rights Centre, University College of Cape Breton, 24 June 1991; see also: James McCloskey, "Convicting the Innocent," *Criminal Justice Ethics*, Winter/Spring 1989, pp. 2 and 54-59, where many of the same points are made. Mr. McCloskey is Head of the Centurion Ministries - this organization has investigated the David Milgaard case.

(5) R.S.C. 1985, c. C-46.

(6) See: David P. Cole and Allan Manson, *Release from Imprisonment: The Law of Sentencing, Parole and Judicial Review*, Carswell, Toronto, 1990, p. 399-409.

three means of exercising the pardoning authority in Canada: the Governor-in-Council (federal Cabinet) may grant a person convicted of an offence a free pardon or a conditional pardon under s. 749 Cr.C.; application may be made to the Solicitor General of Canada for a pardon under the *Criminal Records Act;* (7) and application for mercy to the Minister of Justice may be made under s. 690 Cr.C. It is this last provision that is the focus of this paper. As well, s. 751 Cr.C. provides that the *Criminal Code* provisions do not limit the Crown's royal prerogative of mercy, thus preserving a traditional historical source of pardoning authority in Canada.

Section 690 Cr.C. reads as follows:

> The Minister of Justice may, upon an application for the mercy of the Crown by or on behalf of a person who has been convicted in proceedings by indictment or who has been sentenced to preventive detention under Part XXIV,
> (a) direct, by order in writing, a new trial or, in the case of a person under sentence of preventive detention, a new hearing, before any court that he thinks proper, if after inquiry he is satisfied that in the circumstances a new trial or hearing, as the case may be, should be directed;
> (b) refer the matter at any time to the court of appeal for hearing and determination by that court as if it were an appeal by the convicted person or the person under sentence of preventive detention, as the case may be; or
> (c) refer to the court of appeal at any time, for its opinion, any question on which he desires the assistance of that court, and the court shall furnish its opinion accordingly.

This type of recourse has been in Canadian criminal law since at least 1886(8) and was part of Canada's first *Criminal Code* in 1892.(9) It was amended by Parliament in 1923,(10) 1953(11) and

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(7) R.S.C. 1985, c. C-47.

(8) R.S.C. 1886, c. 181, ss. 38 and 39.

(9) S.C. 1892, c. 29, s. 748.

(10) S.C. 1923, c. 41, s. 9.

(11) S.C. 1953-54, c. 51, s. 596.

1969,[12] since when it has been unchanged, although it was consolidated in the 1970 and 1985 Revised Statutes of Canada. The 1892 version only allowed the Minister of Justice to order a new trial. The 1923 amendment added what are now subsections (b) and (c) allowing the Minister of Justice to refer a case to a court of appeal as if it were an appeal by the accused or to seek that court's opinion on a particular question. The 1953-54 amendment made some technical, drafting changes in the section as it then was. Finally, the 1969 amendment extended the provision to cover not only those convicted of indictable offences, as it had done since 1892, but also those who had been sentenced to preventive detention (dangerous offenders).

Section 690 Cr.C. thus provides the Minister of Justice with discretion to deal with applications for mercy. Such applications are available only to those convicted of indictable offences and those sentenced to preventive detention. If the Minister of Justice chooses to exercise this discretion, he or she may do so in one of three ways:

(a) if the Minister is satisfied that a new trial or hearing is required by the circumstances, such a new trial or hearing may be ordered;

(b) the Minister may at any time refer the matter to a court of appeal for hearing and determination as if it were an appeal by the convicted person or the person in preventive detention; or

(c) if the Minister requires the court of appeal's opinion on any question, the matter may be referred to that court for its opinion, which it is required to furnish.

Each method for the exercise of ministerial discretion is separate and has different procedural, evidentiary and redress implications.

Under s. 690(a) Cr.C., the Minister of Justice must be satisfied in the circumstances that a new trial or hearing should be directed. No criteria or principles of interpretation are set out by which an applicant can determine what evidence must be provided to satisfy the Minister of this. The fact that a new trial or hearing is ordered means that the Crown has the evidentiary burden of proving all constituent

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(12) S.C. 1968-69, c. 38, s. 62.

elements of the offence beyond a reasonable doubt to secure a conviction. Similarly, the accused has all the procedural and evidentiary benefits of being a defendant in a trial before a court of first instance. Additionally, both the Crown and the accused have full rights to appeal procedural and evidentiary rulings as well as any acquittal/conviction or any sentence to the court of appeal and ultimately, with the court's leave, to the Supreme Court of Canada.

Under option (b), the Minister of Justice refers the matter to the court of appeal, which deals with it as if it were an appeal by the convicted person or the person under sentence of preventive detention. This means that the convicted or detained person has the procedural and evidentiary burden of convincing the court of appeal of the wrongful nature of the original conviction or sentence of preventive detention. This may be done by arguing that there were errors of identification or inadequacies in the forensic evidence, or that since the original conviction new evidence has come to light or there has been a recantation of key evidence. Because of the strict nature of the rules of evidence, the court of appeal will only admit fresh evidence that did not exist or that could not have been discovered with reasonably diligent efforts at the time of the original conviction. These rules are, because of the extraordinary nature of the recourse under s. 690 Cr.C., to be applied with a degree of flexibility.(13)

The powers of a court of appeal on hearing an appeal are set out at s. 686 Cr.C. An appeal may be allowed if the verdict is unreasonable or cannot be supported by the evidence, if the trial court judgment should be set aside because of a wrong decision on a question of law or on any ground that there was a miscarriage of justice. In any such case, the conviction is to be quashed and an acquittal is to be entered or a new trial is to be ordered. An appeal may be dismissed where the court believes the accused has been properly convicted on one count of the indictment, where the court believes no substantial wrong or miscarriage of

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(13) *Reference Re: Regina v. Gorecki (No. 2)* 32 C.C.C. (2d) 135 and *R. v. Marshall* (1983) 57 N.S.R. (2d) 286.

justice has occurred or where any procedural irregularities caused the accused no prejudice. In any such case, the court orders the verdict that should have applied and affirms the sentence, imposes the appropriate sentence or directs the trial court to impose the sentence warranted in law. Any decision by a court of appeal is, with leave, appealable to the Supreme Court of Canada.

Under s. 690(c) Cr.C., the Minister of Justice asks the court of appeal for its opinion on any question on which its assistance is required and the court of appeal must do as requested. The Minister, of course, is not bound by the opinion received from the court of appeal. Because this is a reference for a judicial opinion, the procedures and rules of evidence usually applicable before courts of appeal will be interpreted with greater flexibility than in regular appellate proceedings. Because of the nature of ministerial option (c), it is unclear if it would be appealable to the Supreme Court of Canada.

There has not been a great quantity of caselaw under s. 690 Cr.C. Cole and Manson have made the following capsule summary of these cases:

> It is not uncommon for prisoners who have exhausted all statutory routes of appeal to seek the intervention of the Minister of Justice. The past few decades reveal a small number of cases which have been returned either to a trial court or to an appellate court. This often arises when there is reason to believe that the convicted person was the wrong person. ... There have ... been examples of section 617 [now s. 690] being used in respect of the fitness of sentences imposed in light of new psychiatric evidence and whether, in light of psychiatric evidence not adduced at trial, a prisoner was insane within the meaning of section 16 of the *Criminal Code*. In these kinds of cases, the reference resulted in each being treated as if it was a new appeal, albeit in light of new and fresh evidence. Other references have sought the opinion of the court on specific legal or evidentiary issues such as, for example, whether new evidence indicated that an accused was incompetent at the time of his trial to instruct counsel and whether new evidence would be admissible at a new trial in light of concerns about its probative value and its nature as, potentially, hearsay.(14)

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(14) Cole and Manson (1990), p. 409-410; references to case citations have been removed from the quotation by the author of this paper.

PRESENT PRACTICE

As indicated by Cole and Manson, applications to the Minister of Justice under s. 690 Cr.C. for mercy is available to and resorted to only by offenders who have exhausted all other statutory routes of appeal. Only a small number of s. 690 Cr.C. applications to the Minister are successful in obtaining intervention. This is reflected in the following table.

Applications for Mercy (s. 690 Cr.C.)(15)

Fiscal Year	Number of Applications	Number of Interventions
1985-86	34	0
1986-87	30	0
1987-88	35	0
1988-89	20	1
1989-90	27	0

Figures for fiscal year 1990-1991 were not available at the time this paper was in preparation. The Minister of Justice did intervene in the Nepoose case (involving recantations of trial testimony) under s. 690(b) Cr.C. when, on 15 June 1991, she referred this case for review to the Alberta Court of Appeal.(16) This case will undoubtedly figure in the 1991-92 Annual Report of the Department of Justice.(17)

Although these statistics are of some assistance, taken alone, they may be misleading. They do not reflect the nature and complexity of applications to the Minister for mercy. Some applications are accompanied by a minimum of supporting information and documentation. Investigations may be lengthy and involve difficult evidentiary and

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(15) This information is drawn from the Department of Justice, *Annual Reports*, for the fiscal years 1985-86 to 1989-90.

(16) Letter of 17 June 1991 from Minister of Justice to counsel for Nepoose and Department of Justice, *Press Release*, 19 June 1991.

(17) On 29 November 1991, the case of David Milgaard, a s. 690 Cr.C. application, was referred by Order in Council to the Supreme Court of Canada under s. 53 of the *Supreme Court Act*, R.S.C. 1985, c. S-26.

forensic issues which have to be fully canvassed. In some cases, it may take considerable time to locate witnesses and documents. Not all applications are received and investigated to a conclusion in the same fiscal year.

The Department of Justice does not have rules of procedure, guidelines or an application form for dealing with applications to the Minister for mercy.(18) The Department starts from the premise that a s. 690 Cr.C. application is a request to the executive of government for a remedy after all other remedies have failed - and does not regard it as either an appellate review or a re-trial of the case.

The Department of Justice applies as a threshold or a criterion the following question: "Is there a reasonable basis to conclude that there was a likely miscarriage of justice?" Two major issues are brought forward by most applications to the Minister for mercy. These are the presentation of new evidence not available at the time of the original conviction and consideration of current developments in forensic sciences that may lead to a different appreciation of evidence tendered at the time of the original conviction.

Applications to the Minister come in many forms, from a one or two-page letter from an inmate to an exhaustive legal brief with supporting documentation from counsel to an offender. As a standard requirement, the Department of Justice requests that applicants provide it with the following documents:

(a) the trial transcript;

(b) the appellate factums;

(c) the appeal case reasons for judgment; and

(d) a brief setting forth the evidentiary and legal basis upon which the application to the Minister of Justice is based.

If an issue of forensic evidence is raised in an application, such as a new DNA analysis, an applicant will be requested to provide

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(18) This description of the process within the Department of Justice for dealing with s. 690 Cr.C. applications is drawn from an interview with a departmental official conducted by the author of this paper on 10 July 1991.

the Department with a report on this expertise. Applicants will also be asked to provide the Department with the names and addresses of witnesses to be interviewed, and a synopsis of what they can be expected to tell an investigator.

The investigation of an application is carried out by Department of Justice, Criminal Law Branch, counsel, who may be assisted in their investigations by the RCMP, local police forces and forensic scientists or other experts. One counsel acts as full-time co-ordinator of s. 690 Cr.C. investigations who can draw on seven other counsel on an as-needed, part-time basis.

Because the Department of Justice does not see s. 690 Cr.C. applications as adversarial in nature, it deals with them in a flexible manner. If an application is incomplete or if a witness says something other than indicated by the applicant, the Department's investigating counsel will ask the applicant for more information or even meet with the applicant or counsel. Such meetings are informal - they are not a hearing and the applicant or counsel is not given access to documents or reports prepared by the Department. Finally, the applicant is not given formal notice of adverse findings or an opportunity to adduce evidence before a report goes to the Minister for consideration. As already mentioned, a s. 690 Cr.C. application is neither an appellate procedure nor a re-trial of the issues.

Once an investigation has been completed by the investigating counsel, a report is prepared. It sets out the facts, describes the investigation, outlines the issues, discusses the law, sets out conclusions based on the facts and makes a recommendation. This "preliminary report" then goes up the departmental organizational ladder to the Senior General Counsel, Criminal Law, the Assistant Deputy Attorney General, the Associate Deputy Minister of Justice and, finally, the Deputy Minister of Justice. At each of these levels, the report can be accepted, rejected or sent back for more work on the law, the evidence or the investigation. Once it has gone through all these levels of approval, the departmental report and supporting documents go to the Minister of Justice with a recommendation that can be accepted, rejected or sent back for further work.

Once an application has been dealt with by the Minister of Justice, a letter signed by the Minister is sent to the applicant setting out the response and addressing each issue raised by the application. The length and nature of the Minister's response may depend on the nature and length of the application for mercy.

PROBLEMS WITH PRESENT LAW AND PRACTICE

This part of the paper will set out some of the difficulties raised both by s. 690 Cr.C. as it is now and by the manner in which it is administered by the Department of Justice. These problems are faced by both applicants to the Minister of Justice for mercy and by legal counsel who act on their behalf.(19)

As indicated earlier in this paper, the Minister of Justice can exercise the s. 690 Cr.C. discretion by ordering a new trial, by referring a case to the court of appeal as if it were an appeal by the convicted person or the person sentenced to preventive detention, or by asking the court of appeal for its opinion on any question on which its assistance is required. The route chosen will determine the burden of proof, the nature of evidence that can be adduced, the breadth of the investigation and the appellate rights of the parties. This was an issue in the Donald Marshall case where the Minister of Justice ordered an appeal (s. 690(b) Cr.C.) rather than a reference for an opinion (s. 690(c) Cr.C.) to the Nova Scotia Court of Appeal. This meant that the wrongfully convicted Donald Marshall had the burden of proof as an appellant and the Court of Appeal had a narrower mandate than if its opinion had been sought on a series of related questions.(20)

The lack of established rules of procedures has been a source of frustration for some legal counsel. As a consequence, they have,

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(19) This part of the paper is based in part upon interviews conducted by the author with legal counsel for four different s. 690 Cr.C. applicants on 9, 10, 17 and 18 July 1991.

(20) Royal Commission on the Donald Marshall Jr. Prosecution, *Report*, p. 113-115.

at the start of a s. 690 Cr.C. application, been uncertain of what documents and what types of evidence have to be submitted to the Department of Justice. This difficulty has been resolved by informal discussions with Department of Justice counsel, by experience in related matters or by conversations with counsel for other s. 690 Cr.C. applicants.

There is also an uncertainty as to the evidentiary burden of proof counsel for applicants have to discharge to convince the Minister of Justice to intervene under s. 690 Cr.C. Do they have to raise a reasonable doubt about the original conviction or is the burden a balance of probabilities? As indicated earlier in this paper, the burden of proof applied by Department of Justice investigating counsel is "Is there a reasonable basis to conclude there was a likely miscarriage of justice?" One counsel interviewed for this paper believed that this burden of proof was too high and that it should be focused on the issue of whether "serious questions about the conviction or the sentence of preventive detention had been raised."

The types of evidence and documents collected by the Department and the nature of the report to the Minister of Justice were issues raised by some counsel for applicants. They were also concerned that they were not advised of adverse findings and allowed to make further legal or evidentiary responses before the investigation report was submitted to the Minister of Justice. Although departmental investigating counsel do contact applicants' counsel for clarifications and more investigatory leads, this is as far as it goes.

Some applicants' counsel have observed that the letter containing the Minister of Justice's response to an application for mercy may not provide the reasons for rejecting the application in sufficient detail. This, and the fact that applicants' counsel do not know what documents and what type of report have gone to the Minister of Justice, make it difficult for applicants' counsel to determine whether there are sufficient grounds to consider seeking judicial review of this exercise of ministerial discretion.

A final issue of concern to applicants' counsel is the lack of financial assistance available to convicted people who may wish to

submit a s. 690 Cr.C. application for mercy to the Minister of Justice. In several instances, provincial legal aid plans have refused to assist s. 690 Cr.C. applicants with their legal fees and disbursements. In some cases, counsel have done this work on a *pro bono* basis and assumed thousands of dollars in disbursements, while in others, non-governmental organizations have financially supported the applications.

REFORM PROPOSALS

There have not been an overwhelming number of proposals for reform of s. 690 Cr.C. Two of them will be briefly described in this part of the paper. One was proposed in the December 1989 Report of the Marshall inquiry and the other, in two variations on a theme, was contained in Private Members' Bills C-230 and C-239, which received First Reading in the House of Commons in June 1991.

The Commission of Inquiry into the Marshall prosecution proposed that the federal Minister of Justice and provincial Attorneys General begin discussions on the establishment of an independent body to deal with the re-investigation of instances of alleged wrongful conviction. The Commission further recommended that this body have full investigative powers so as to have access to any necessary witnesses or evidence. A final element in the recommendations was the development of measures to provide adequate compensation for those found to have been wrongfully convicted.(21) These recommendations were accepted by the government of Nova Scotia, which had set up this inquiry, on 7 February 1990,(22) and were discussed at a 15 June 1990 federal-provincial meeting of ministers responsible for justice.(23)

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(21) *Ibid.*, p. 143-148.

(22) *Government of Nova Scotia Response to the Recommendations of the Royal Commission on the Donald Marshall Jr. Prosecution*, p. 1-2.

(23) Department of Justice, *Press Release*, p. 2. A committee of officials was set up to consider the recommendations and report to their Ministers. There is no mention of this issue in the Press Release distributed following the 5 September 1991 federal-provincial-territorial meeting at Yellowknife, Northwest Territories of Ministers Responsible for Justice.

Bill C-230 received first reading in the House of Commons on 10 June 1991, while Bill C-239 received first reading on 18 June 1991. Both Private Members' Bills propose amendments to s. 690 Cr.C. Bill C-230 would add ss. (2) to (18) to s. 690 Cr.C. to enable the Minister of Justice to refer any application for mercy to a Special Counsel for investigation and recommendation. Bill C-239 would add ss. 690.1 to 690.3 to s. 690 Cr.C. to enable the Minister of Justice to refer any application for mercy to a Conviction Review Commission for investigation and recommendation.

In both bills, those who investigated an application would have to have had no prior connection with a case being examined and would be directed not to restrict their review to the evidence adduced at trial. In both bills, the Special Counsel or Commission might recommend and the Minister would have to grant whatever financial assistance the applicant was deemed to require. Finally, both bills would require the applicant to be provided with a copy of the report of and documents considered by the Special Counsel or Commission by the Minister of Justice so that the applicant might make further submissions before the Minister made a decision under ss. 690 or 749 Cr.C.

Both the Inquiry recommendations and the Private Members' Bills deal with the receipt and investigation of s. 690 Cr.C. applications. None of the reform proposals deals with s. 690 Cr.C. itself, the three forms of discretion available to the Minister of Justice, or the evidentiary and appellate implications of each.

PROPOSAL FOR CHANGE

Applications to the Minister of Justice under s. 690 Cr.C. differ fundamentally from applications for the exercise of the prerogative of mercy, or for free or conditional pardons. Section 690 applications for review usually involve cases where there may be some doubt as to the validity of a criminal conviction. The applicant contends that the conviction is wrongful and should be reconsidered through a new trial or by recourse to a court of appeal. An application for the exercise of other forms of pardoning authority implies an acceptance of the validity of a criminal conviction and requests some relief from its consequences.

At the present time, an application for s. 690 Cr.C. relief is made to the Minister of Justice. Department of Justice counsel investigate the applications and make recommendations to the Minister, who makes the final determination. The present law and practice place the Minister and Department of Justice in a difficult position.

The Minister of Justice and the Attorney General of Canada are one and the same person, though performing different and potentially contradictory functions. The Minister of Justice provides policy advice, while the Attorney General provides legal advice to government. Both the criminal policy component advising the Minister of Justice and the criminal prosecution component of the Attorney General of Canada may be involved in the development of criminal law. The Minister of Justice appoints judges before whom the Attorney General of Canada or her agents may appear. The Minister of Justice ensures that legislation complies with the *Canadian Charter of Rights and Freedoms*, while the inadequacies of this legislation may be defended by the Attorney General of Canada. These are just a few of the potential conflicts in having the two roles performed by one Minister.(24)

This conflict in roles has an impact on the perception, at least, of the fairness and thoroughness with which s. 690 Cr.C. applications are investigated and considered by the Department of Justice. It can be argued that the Department's prosecutorial bias may lead to an undue deference to judicial determinations of guilt and an insufficiently rigorous questioning of the foundations of criminal convictions. Any such perception, whether well-founded or not, undermines the s. 690 Cr.C. review process in the eyes of those who matter most, the applicants. Proposals for change must put an end to such concerns about unfairness.

This could be done by providing that applications for s. 690 Cr.C. review be received and investigated by a commission or agency independent of the Department of Justice, or of government, but accountable

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(24) They are dealt with more completely in: Law Reform Commission of Canada, *Controlling Criminal Prosecutions: The Attorney General and the Crown Prosecutor*, Working Paper 62, Supply and Services Canada, Ottawa, 1990, p. 1-41.

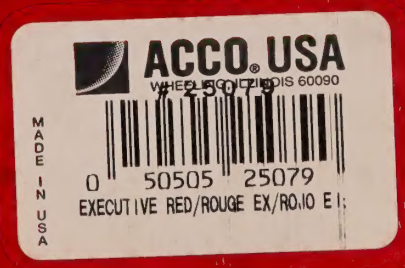
to Parliament. This commission or agency could be given independent statutory existence and provided with adequate investigative resources. It could be required to develop rules of procedure and evidence so as to ensure applicants were provided with ample disclosures of evidence and opportunities to make representations. Provision could also be made to furnish financial and legal assistance to applicants where such assistance was not available from other sources.

This commission or agency could also be empowered either itself to dispose of applications for review of criminal convictions or to recommend to Cabinet or the Minister of Justice how the applications should be resolved. Whether the commission or agency, or Cabinet or the Minister of Justice, made the final determination, all three of the present recourses available under s. 690 Cr.C. could be retained, or one or more of them could be eliminated. As well, an entirely new recourse could be developed.

Whatever the form of any proposal for change, it would have to ensure that the means by which applications for review of criminal convictions were received and investigated was fair and thorough, and was perceived as such.

CONCLUSION

In its consideration of the review of criminal convictions, this paper has described present experience and some of the issues to be addressed by proposals for change. The reconsideration of convictions will always be an exceptional event, no matter what reforms are put into place; an effective means of carrying out this task will strengthen the effectiveness and fairness of the criminal justice system.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